

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH ALLAN AMES,

Defendant-Appellant.

UNPUBLISHED

June 19, 2014

No. 315390

Kent Circuit Court

LC No. 12-001774-FH

Before: DONOFRIO, P.J., and GLEICHER and M. J. KELLY, JJ.

PER CURIAM.

A jury convicted the 24-year-old defendant of two counts of fourth-degree criminal sexual conduct, MCL 750.520e(1)(a), and one count of accosting a child for immoral purposes, MCL 750.145a, for inappropriately touching two girls, one aged 13, the other 14. Defendant contends that his trial counsel was ineffective for presenting a recorded interview during which defendant offered to take a polygraph examination, opening the door for the prosecutor to elicit testimony that the test was actually given. Counsel's error was prejudicial, defendant asserts, because the jury could infer that defendant failed the test.

Based on defense counsel's stated theory of the defense in opening, the decision to present the recorded interview was not constitutionally deficient. And given the trial court's repeated, in-depth instruction to the jury regarding the inadmissibility and unreliability of polygraph evidence, defendant did not endure prejudice. We affirm.

I. BACKGROUND

This case was a pure credibility contest. The complainants claimed that defendant became intoxicated during a gathering hosted by the friend of one girl's mother. They alleged that defendant cornered them in the home's computer room and allowed them to share his alcoholic beverage. He then grabbed their breasts and stuck his tongue in their faces while making inappropriate comments. He later kissed one girl on the mouth in the living room. The other girl claimed she passed the computer room at another point in the evening and saw defendant watching pornography. She testified that defendant grabbed her thigh and tried to pull her into the room. The next day, defendant allegedly seemed nervous and sent one girl an apologetic Facebook message.

At trial, the prosecutor presented the testimony of Kent County Sheriff's Deputy David Schmuker. Schmuker testified that he interviewed defendant and that the meeting was video recorded. On cross-examination, defense counsel played the recorded interview for the jury. In the recording, defendant admitted that he kissed one girl on the cheek and that this was inappropriate, but denied all other claims of wrongdoing. Detective Schmuker accused defendant of lying. Defendant desperately replied, "Hook me up to a lie detector test . . . [i]f that's the only thing that's going to show" The detective then stated his intent to deny defendant's request. Just before defense counsel introduced this evidence, the prosecutor requested a side bar conference. According to later statements by the court, the prosecutor warned defense counsel about the polygraph reference (as well as other potentially damaging information within the recorded interview) and defense counsel "indicated that he preferred, or was willing to just play the whole thing without any redactions."

On redirect examination, the prosecutor asked Schmuker, "He said in the interview that he wanted a lie detector test. Did you give him one? Yes or no." The detective answered in the affirmative. Defense counsel immediately requested a side bar conference, during which he apparently objected to the prosecutor's question. On return to the record, the court gave the following, detailed instruction to the jury:

I'm going to ask the jury - - the comment about the polygraph, first of all, polygraphs, lie detectors, I don't want you to give any thought to that at all. To be quite honest with you, they are not admissible in court, either way, to prove innocence or to prove guilt, they are just not admissible. And quite frankly, I have a lot of issues with their reliability, whatever they're showing. That's why they're not admissible, it's not just me. As far as I know, they're not admissible in any court in the country. I could be wrong about that.

But I've had people who have taken polygraphs and have passed them, and it's totally obvious, for one reason or another, that it was not truthful, and I've had it the other way around, too. So the fact that there was a comment about it, in something to do with this case, I'm telling you right now to disregard it, not give it any weight whatsoever, either for the prosecution or for the defendant. Just ignore it, don't try to think about what was done, don't try to think about the results. They're frankly just not, they're just not relevant, and I'm going to rely upon you as jurors to take that instruction and to not give it any weight whatsoever.

Okay? Can you all promise me you'll do that?

The jurors nodded their assent.

The following day, the court summarized the events surrounding the presentation of information about defendant's polygraph examination. The court described its instruction as "one of the more forceful attempts at a curative instruction as I could come up with" and indicated that it "went into a fair amount of detail." Even so, defense counsel requested a mistrial, because "the fact that he took [a polygraph test] now raises an inference that the jury is

going to be pondering and questioning in their head, as they sit there, that I can't know the answer to."

The trial court denied defendant's motion for a mistrial, noting that defense counsel wanted the entire interview played for the jury despite awareness that "there were issues" with information that should not reach the jury. The court continued that defense counsel was "a competent lawyer, and in fact there were good reasons to play the entire interview." Moreover, the fact that defendant offered to take a polygraph examination "could be very helpful" to him and "detrimental to the prosecution." The court further determined that its immediate instruction to the jury and the jurors' response to the instruction "was strong enough and compelling enough" to deny the mistrial. The court then forbade the parties from raising the polygraph issue in closing argument.

At the close of trial, the court reminded the jury not to consider defendant's request for a polygraph examination or Detective Schmuker's testimony that defendant took such a test:

Now, during trial there were references to a polygraph test possibly being requested, offered, and/or taken, that type of thing. I would like to remind you, ladies and gentlemen, of my previous instructions regarding these references. And I reiterate in the strongest possible terms that any such reference is not evidence and must be disregarded. It cannot be used to support the defense or the prosecution. It must not affect your verdict in any way.

II. ANALYSIS

On appeal, defendant does not challenge the trial court's decision to deny his mistrial motion. He does not contest the prosecutor's conduct in eliciting testimony that defendant took a polygraph test. Defendant's sole argument is that defense counsel was ineffective in playing defendant's entire police interview for the jury, knowing that defendant requested a polygraph examination, thereby opening the door for the prosecutor to query whether defendant took such a test. The jury's knowledge that defendant took the test without information about the result allowed the jury to infer that defendant failed and was incredible, according to defendant.

Although defendant sought to remedy the harm caused by the admission of the recorded interview, he did not preserve his challenge to counsel's performance by seeking a new trial or a *Ginther*¹ hearing. Accordingly, our review is "limited to mistakes apparent from the record." *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012).

Criminal defendants have the right, not only to counsel, but to the effective assistance of counsel. *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984), quoting *McMann v Richardson*, 397 US 759, 771 n 14; 90 S Ct 1441; 25 L Ed 2d 763 (1970). An ineffective assistance claim includes two components: "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

performance prejudiced the defense.” *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To establish the deficiency component, a defendant must show that counsel’s performance fell below “an objective standard of reasonableness” under “prevailing professional norms.” *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). With respect to the prejudice aspect, the defendant must demonstrate a reasonable probability that but for counsel’s errors, the result of the proceedings would have differed. *Id.* at 663-664. The defendant also must overcome the strong presumptions that “counsel’s conduct [fell] within the wide range of reasonable professional assistance,” and that counsel’s actions were sound trial strategy. *Strickland*, 466 US at 689.

This Court gives defense counsel “wide discretion as to matters of trial strategy because counsel may be required to take calculated risks to win a case.” *Heft*, 299 Mich App at 83. Decisions regarding what evidence to present are presumed to be matters of trial strategy, and we “will not second-guess counsel on” such matters, “nor we will assess counsel’s competence with the benefit of hindsight.” *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). In addition, a defense counsel’s strategy does not “constitute ineffective assistance of counsel simply because it did not work.” *Heft*, 299 Mich App at 84 (citation and alteration omitted).

Defense counsel’s decision to admit the entire interview between defendant and the detective constituted sound trial strategy. Counsel’s plan was to show defendant’s unwavering truthfulness in the face of the unfair and harassing manner in which the sheriff’s department pursued this case. In opening statement, defense counsel described that Detective Schmuker “grilled him, I mean grilled him” during the interrogation, employing “tactics that are meant to gain confessions.” Even so, defendant denied committing the charged acts against the complainants. Defendant stated more than once that he would submit to a polygraph examination to prove his innocence, but the detective clearly expressed his reluctance to give him the test. Although “testimony concerning [a] polygraph [is] inadmissible,” *People v Ortiz-Kehoe*, 237 Mich App 508, 514; 603 NW2d 802 (1999), playing the entire interview allowed the jury to consider the bullying manner employed by the detective and to observe defendant’s steadfast denial of sexual assault. Even defendant’s insistence that he wanted to submit to a polygraph examination tended to show his innocent conscience.

While the presentation of the interview in its entirety opened the door for the prosecutor to elicit testimony that defendant eventually took a polygraph examination, we discern no reversible prejudice in the admission of that statement or the omission from the evidence of the test results. The trial court’s cautionary jury instructions should serve as an example to other courts. The court did not simply tell the jury to ignore the testimony in the usual bland fashion. The court explained in detail why polygraph evidence is inadmissible and deemed unreliable in courtrooms nationwide. The court ensured that the jury understood the import of not considering

the evidence. While appellate courts generally say in a rote fashion that jurors are presumed to follow their instructions, we can make that statement with conviction here. See *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

We affirm.

/s/ Pat M. Donofrio
/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly